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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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| In re Applications of |) | MM DOCKET NO. 93-88 |
| |) | |
| EZ COMMUNICATIONS, INC. |) | File No. BRH-910401C2 |
| |) | |
| For Renewal of License of |) | |
| Station WBZZ (FM), |) | |
| Pittsburgh, Pennsylvania |) | |
| |) | |
| ALLEGHENY COMMUNICATIONS |) | |
| GROUP, INC. |) | File No. BPH-910628MC |
| |) | |
| For Construction Permit for a |) | |
| New FM Broadcast Station |) | |
| Pittsburgh, Pennsylvania |) | |

To: The Commission

MASS MEDIA BUREAU'S
OPPOSITION TO MOTION
FOR LEAVE TO FILE APPLICATION FOR REVIEW

1. On May 10, 1993, Allegheny Communications Group, Inc. ("Allegheny") filed a Motion for Leave to file an Application for Review. The Mass Media Bureau submits the following comments in opposition.

2. Allegheny seeks the Commission's immediate review of the Hearing Designation Order in the above-captioned proceeding, 58 Fed. Reg. 19106, published April 12, 1993 ("HDO"). Such review is precluded by Section 1.115(e)(3) of the Commission's Rules,

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unless the Presiding Judge certifies the application for review. Allegheny's request for certification of its application for review was denied by the Presiding Judge. Memorandum Opinion and Order, FCC 93M-218, released May 3, 1993. Nevertheless, Allegheny urges the Commission to consider its application for review at this time, notwithstanding the Section 1.115(e)(3) prohibition.¹ In support, citing Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331 (1991), Allegheny argues that compelling and urgent circumstances outweigh the disruption which would result if the Commission entertained review at this time. The Bureau disagrees.

3. The first circumstance cited by Allegheny is the purported likelihood of a remand should review be deferred. Allegheny insists that the HDO employed the wrong standard in evaluating Allegheny's petition to deny the competing renewal application of EZ Communications, Inc. ("EZ"). Allegheny states, at p. 9 of its Motion, that "[i]f the facts can possibly be read to support the petitioner's ultimate inference, [a] prima facie showing has been made," citing Astroline Communications Co. v. FCC, 857 F.2d 1556 (D.C. Cir. 1988). This is simply not the standard. As a threshold matter, petitioner must submit specific

¹ Section 1.115(e)(3) does not preclude Commission review; it merely defers it until a Review Board decision has been released in the proceeding.

allegations of fact sufficient to show that a grant would be prima facie inconsistent with the public interest. Section 309(d)(1) of the Communications Act of 1934, as amended. The Commission must evaluate those facts assuming that they are true. Then, the Commission must determine whether a substantial and material question of fact is presented warranting a hearing. In so doing, the Commission takes into account pleadings and other matters of which it can take official notice. Astroline Communications Co. Applying the Astroline standard, the HDO's conclusion that a hearing was not warranted on the requested issues is correct. Thus, there is no likelihood of a remand on this basis, as Allegheny asserts.

4. Secondly, Allegheny argues that immediate review is warranted because of the importance of the issues to the Commission. The Bureau submits that all potentially disqualifying issues are important. An applicant's view of the relative importance of issues which it has raised does not justify a waiver of Section 1.115(e)(3) of the Commission's Rules.

5. Finally, Allegheny relies upon a perceived need for Commission clarification of its policies with regard to each of the issues Allegheny sought in its petition to deny. Allegheny

insists that each of the issues purportedly requiring clarification raises important legal questions of wide-ranging implication. We do not agree.

6. The HDO correctly rejected Allegheny's contentions that further inquiry was warranted as to whether EZ broadcast indecent programming on WBZZ(FM). The HDO based its decision, in part, on a lack of documentation. The full rationale is set forth in the HDO, and requires no clarification.

7. To buttress its claim that immediate clarification is needed with regard to the HDO's refusal to specify a "discrimination" issue, Allegheny mischaracterizes rulings in the HDO. Among the factors considered in denying a request for a "discrimination" issue, the HDO stated that the Commission's equal employment opportunity rule, Section 73.2080, is designed to prevent discrimination by licensees in the recruiting, hiring, or promoting of employees. The HDO did not hold that sexual harassment is not prohibited by the Commission. Motion at p. 13. The HDO held that "Allegheny has not demonstrated any discrimination in recruiting, hiring or promoting of employees by EZ" which would warrant addition of a Section 73.2080 issue. Similarly, among other factors, the HDO took cognizance of the fact that litigation regarding the alleged sexual harassment had


been settled during the appeals phase. The HDO did not hold that the Commission will not consider an adverse jury verdict if the proceeding settles on appeal. Motion at p. 13.


8. At Pp. 13-14, the Motion states, without support, that the HDO raises serious doubts about the Commission's willingness to protect the integrity of the Commission's processes. The only apparent basis for such a view is Allegheny's disagreement with the HDO's failure to specify an abuse of process issue. The reasons for this action are fully set forth in the HDO, and, contrary to Allegheny's claim, the matter requires no clarification of the Commission's intentions. Motion at p. 14.


9. Finally, Allegheny alleges that the HDO has caused uncertainty about the Commission's policy on news distortion. No such uncertainty has been created. News distortion involves the broadcast of information. The programming at issue here is simply not the type which is subject to news distortion and the HDO was correct in so ruling.

10. For the reasons set forth in the foregoing comments, the Bureau opposes Allegheny's Motion for Leave to File an Application for Review of the HDO.

Respectfully submitted,
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May 19, 1993

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has, on this 19th day of May, 1993, sent by regular United States mail, U.S. Government frank, copies of the foregoing **"Mass Media Bureau's Opposition to Motion for Leave to File Application for Review"** to:

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